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SUPREME COURT, U.S.

Nos. 80-1640, 80-1656

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.
Petitioners,

v.

STEVEN SHOLLY et al.
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

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February 11, 1983

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.

Petitioners,

v.

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RESPONSE TO FEDERAL PETITIONERS' REPLY MEMORANDUM ON SUGGESTION OF MOOTNESS

On February 17, 1983 the Solicitor General filed with the Court the "Petitioners Reply Memorandum in Support of Suggestion of Mootness" (Rep. Mem.). Respondents submit the following arguments in response to Petitioners' Memorandum.

1. Federal Petitioners argue that, because under the new Amendments to § 189 of the Atomic Energy Act, the "[Nuclear Regulatory] Commission may dispense with a prior hearing when an operating license amendment is determined to entail 'no significant hazards consideration,'" there can be no doubt that under the facts of this case the NRC could validly dispense with a prior hearing; and therefore, they argue, this case is moot. (Rep. Mem. 1-2)[1]

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1. Petioners quote the Senate manager of the "Sholly" amendment for the proposition that the Court of Appeals made an "erroneous judicial interpretation of the hearing requirement." (Rep. Mem. 2, note) However, a reading of the legislative history reveals that many of the supporters of the amendment were unable to distinguish between the ruling in Sholly and the possible implications of that ruling. This was not surprising inasmuch as the NRC represented to Congress, as it did to the Court below, that the Sholly decision would have dire consequences and implications which it indeed did not. Cf. "NRC Motion to Stay Issuance of Mandate,"

This argument is misplaced for two reasons. First, the Amendments do not remove doubt whether a hearing was required under the facts of this case. Rather Congress clearly suggested that a hearing is required under the circumstances of this case. See "Opposition to Federal Petitioners' Suggestion of Mootness," 12 (Opposition). Second, even if Congress did pass a law which replaced a vague rule with a rule of unmistakeable clarity, such action by Congress does not moot a case which is otherwise a live Article III "case or controversy" [2].

(footnote continued)
dated December 10, 1980 with "Petitioners' Opposition to NRC's Motion to Stay Issuance of Mandate," filed December 17, 1980. Because of this deception Congress in the end passed Pub. L. 97-415 which it thought was necessary to overturn Sholly yet did not in fact overturn the decision, but rather did no more than limit it in scope.

2. This truism might be more obvious to Petitioners were they in the position of Respondents before the Court. Surely the positioning of the parties on appeal does not affect the mootness vel non of an issue one way or the other.

Cases cited by Federal Petitioners are not to the contrary. In the Chicago Board Options Exchange v. Board of Trade of Chicago, __U.S.__ (Nov. 29, 1982) the Court of Appeals had "held that pending any future action by the Commodity Futures Trading Commission all trading of options on GNMA bonds is prohibited." (emphasis added). The holding of the Court of Appeals became moot in the Supreme Court when regulatory action satisfied the condition which qualified the holding. 677 F.2d 1137 (7th Cir. 1982). The fact that the holding became moot by its very terms when the Trading Commission acted makes the Chicago case clearly distinguishable from this case.

In State Fair of Texas v. United States Consumer Products Safety Commission, 454 U.S. 1026 (1981) a ruling became moot when the law was changed so as to make the remedy asked for in the suit unavailable.

Again, the State Fair case has no bearing on this declaratory judgment action.

2. Federal Petitioners next contend that,

> This case was adjudicated by the court of appeals solely on the basis that the question whether the Commission had interpreted Section 189(a) correctly was capable of repetition between the parties to this case, yet evading review (Rep. Mem. 3).

Federal Petitioners' interpretation of the Court of Appeals decision is simply wrong. This does not state the question decided, and determined not moot, by the Court of Appeals. Indeed, if this were the quesiton decided and determined not moot by the Court of Appeals - whether an NRC interpretation is correct or not - this would present the epitome of a case non-justiciable because it calls for an advisory opinion.

The issue presented to the Court of Appeals was adequately stated by the Court of Appeals itself in the section of its

opinion titled "Mootness," 651 F.2d at 785, where it said,

> The Commission plainly intends to adhere to its policy of denying a hearing on a license amendment, under certain circumstances, even though interested parties specifically request a hearing. The chances of recurrence are more than speculative....

The issue before the Court of Appeals was not an abstract question concerning a particular interpretation of law by the NRC; it was rather the very real question of whether under the law the NRC could avoid a requested hearing on licensing action involving the release of radiation into the atmosphere. Respondents contend that the answer to that question under the Amendment is "no" just as it was under the pre-existing law.

Petitioners claim that no meaningful relief can be had in this case under the new amendment. (Rep. Mem. 3). But the only relief available under the pre-existing law was the declaratory judgment entered by the Court below. This was a

meaningful remedy precisely because it would help to prevent recurrence of the denial of a meaningful hearing under the circumstances of this case. A ruling based upon § 189 as amended would have precisely the same effect. It is just as likely now as it ever was that the NRC will attempt to use a "no significant hazards consideration" finding to deny a hearing in the circumstances of a radiation release presented by this case.

The judgment of the Court of Appeals was that "[t]he NRC's refusal to hold a hearing violated the petitioners' statutory rights." 651 F.2d at 791. This judgment is as valid now, after the enactment of the amendment, as it was before. The amendment concededly affects the reasons a Court would apply to reach this judgment; but it does not affect the judgment.

Petitioners claim that in future cases where the NRC repeats its refusal to hold a

requested hearing on licensing actions involving emissions of radioactive materials, "[t]he legal questions that could be raised ... would be entirely different from those raised heretofore in this case." (Rep. Mem. 3). This statement is simply false.

The legal question in future such cases will focus on whether the licensing action in fact does raise "significant hazards considerations" within the meaning of that phrase as newly elucidated by Congress. This precise issue was squarely put to the Court of Appeals. In their briefs below Respondents argued, in rather great detail, the proposition that the "NRC's 'no significant hazards consideration' determination is invalid both as a matter of law and as a matter of fact." "Brief of Petitioners," filed July 31, 1980, p. 17 ff. The precise arguments made there have now in fact been strengthened by the

action of Congress. See Opposition 11-12. The Court of Appeals, in light of its analysis of the plain language of § 189, simply did not deem it necessary to address this issue. 651 F.2d at 786 n.16. But before the Court of Appeals' judgment can be attacked on the grounds of mootness under the new law this issue must be resolved.

The issue involved in this case, squarely raised below, is one that will arise again in future cases. The non-compliance by the NRC with its duty to provide a hearing on this kind of licensing action, one which risks the life and health of affected persons, is fully capable of repetition. The analysis under the new law is similar to the analysis which the Court of Appeals was asked to apply to the old law, but would now be made with the benefit of important clarification by Congress favorable to the position of Respondents.

b) Petitioners contend that there would be no reason to remand this case to the Court of Appeals, as suggested by Respondents, to consider the issue presented in light of the new amendment. However, the Supreme Court has routinely held that cases on appeal are subject to the law in effect at the time of decision and that where a clearer focus of the record is required to apply that law, remand is appropriate. Opposition 15-16, 20-21

Petitioners next state that "the issue in the court of appeals was never of constitutional dimensions." (Rep. Mem. 4). This is a clear mistatement of fact belied by the record below. Respondents, in their principal brief to the Court of Appeals, argued at some length on constitutional issues, "Brief of Petitioners," 18-33, to the conclusion that "the NRC has raised serious

constitutional problems under the long dormant 'delegation of power' doctrine and under the Due Process Clause." Id. 32.

It has been possible to avoid these constitutional issues only so long as a right to hearing on licensing actions involving releases of radiation is preserved under the statute. For the very same reason that the NRC is likely to repeat the denial of hearing in these circumstances, the constitutional questions are also not moot.

3. Petitioners state that no precedent has been cited where this kind of case has been disposed of by way of dismissal of the writ of certiorari. (Rep. Mem. 4). Abundant examples exist of where the Court has dismissed the writ of certiorari because a case has lost importance while pending decision. Cf. Supreme Court Rule 19.

One way in which the Court has deemed

cases to have lost importance has been when new law vitiated the import of the question presented on certiorari.

For example, in Cook v. Hudson, 429 U.S. 165 (1976) the Court granted certiorari to consider whether the First and Fourteenth Amendments prohibited a state school board from firing teachers who sent their own children to private schools which discriminated on the basis of race. An intervening decision of the Supreme Court held that 42 U.S.C. § 1981 prohibited private schools from discriminating. This made potential application of any right the Petitioner might have established of limited importance. The Supreme Court, accordingly, dismissed the writ of certiorari; the Court did not declare the case moot. See also Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (Harlan, J., concurring) (writ of certiorari dismissed in case brought under

an Act repealed after certiorari had been granted.)

These cases, though arising under circumstances different from the instant case, show that a change of law on appeal can impair the importance of a case for purposes of certiorari jurisdiction in the Supreme Court.

4. Petitioners have used the enactment of Atomic Energy Act amendments to reargue an issue resolved in the Court of Appeals and not formally presented to this court in the petitionfor writ of certiorari. While mootness is of jurisdictional significance, this is no reason to shortcut the deliberate process of briefing and decision-making in the Supreme Court. This issue of mootness has been brought before the Court in too precipitous a fashion. See Respondents' "Application for Extension of Time To

Answer," filed January 25, 1983.

There is no urgency in this case, by consent of the parties a long-pending case before the Supreme Court, to warrant this schedule. If the Court is unable to conclude that the case has so lost importance that the writ of certiorari should be dismissed, and wishes to address the mootness question, the case should be set down for full briefing and argument on the mootness issue that has now been presented to the Court by the Petitioners.

Respectfully submitted,

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February 18, 1983